No. 97-18

Supreme Court
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In The

Supreme Court of the United States

October Term, 1996

DOROTHY MONICA DAVID,

Petitioner,

vs.

CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City of Denver; ARISTEDES ZAVARAS, Former Chief of Police, City and County of Denver; MANUEL MARTINEZ, Former Manager of Safety, City and County of Denver; STANLEY BANIESZEWSKI; JOHN R. JOHNSON; WILLIAM HONER; JAMES LEO and CLAYTON KELLY CARPENTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Whether there is a split in the United States Courts of Appeals as to whether a public employee's allegations of sexual harassment involve matters of public concern.

2. Whether the Tenth Circuit Court of Appeals properly applied *Connick v. Myers* to determine that the speech of petitioner, a public employee, did not involve a matter of public concern.

3. Whether the Tenth Circuit Court of Appeals appropriately reviewed for abuse of discretion the district judge's decision not to recuse himself from the case under 28 U.S.C. § 455(a).

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The City and County of Denver; Wellington Webb, Mayor; Aristedes Zavaras, former Chief of Police; Manuel Martinez, former Manager of Safety; Stanley Banieszewski; John R. Johnson; William Honer; James Leo; and Clayton Kelly Carpenter hereby submit this brief in opposition to Dorothy Monica David's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. Petitioner has not set forth compelling reasons to support the grant of her petition as required by Supreme Court Rule 10.

STATEMENT OF THE CASE

A. Statement of the Facts

Pursuant to Supreme Court Rules 15(3) and 24(2), the respondents are dissatisfied with the petitioner's statement of the facts in that it misstates many of the findings of fact that were made by the district court after a trial on the petitioner's Title VII sexual harassment and retaliation claims. Pet. 10th Cir. Apndx. 390-411 is the district court's findings of fact, conclusions of law, and order.[1] The district court found that the petitioner's [a Denver Police Officer] claims arose out of treatment she alleged occurred during off-duty incidents involving co-workers [also Denver Police Officers] Respondents Baniszewski and Johnson. *Id.* at 390. Petitioner claimed that Baniszewski made uninvited sexual advances to her while they were working on an off-duty job for a management company. *Id.* at 390-91.

Baniszewski admitted he made a comment as alleged by the petitioner, but claims it was made innocently and in jest and not with the intent of harassing the petitioner. *Id.* at 391. As a

1. References to the appendix the petitioner filed in the Tenth Circuit Court of Appeals will be in the form of "Pet. 10th Cir. Apndx. __."

result of their off-duty employment, other disagreements arose over an extended period of time between the petitioner and Baniszewski and Johnson. *Id.* Petitioner reported these disagreements to her supervisor, Sergeant Dave Watt, in June 1987. Following this report, there were "repeated meetings and contacts" between the petitioner, Baniszewski and several supervisors in the petitioner's patrol district, including respondents Honer, Leo and Carpenter. *Id.* The district court further found that "[f]rom the time of the first report in June 1987, until the final departmental order of disciplinary action in August 1989 [against the petitioner], there were constant problems between the [petitioner] and Baniszewski. During this period there were several contacts by [the petitioner] with supervisory officers (Sergeants) alleging harassment by Baniszewski at her off-duty job, threats by Baniszewski against her as a result of the off-duty job, as well as other actions by Baniszewski and apparently Officer Johnson, which [the petitioner] considered to be harassment or threats. There were also reports to supervisory officers (Sergeants) by Officer Baniszewski concerning [the petitioner's] activities principally on her off-duty job. . . . [Petitioner] was later discharged from her off-duty employment, allegedly as a result of a complaint by Baniszewski to her off-duty employer." *Id.* at 392.

The district judge found that "[t]he evidence indicates that during the ongoing controversies between [petitioner] and Officers Baniszewski and Johnson, several different supervisors (Sergeants) attempted to resolve the differences between the parties. Multiple conversations were had both with [the petitioner] and Office Baniszewski, investigations were carried out with respect to the dispute, both officers were ordered to attempt to work out their personal problems, and transfers or reassignments were offered to both. However, it appears clear that neither party would agree to make any accommodations to resolve the issues, as each contended that the other was totally

at fault. It was also suggested by several supervisors (Sergeants) that if either party had evidence of any inappropriate or illegal activities by the other, the matter should be reported to [the] Internal Investigation and Inspection Bureau." *Id.* at 392.

Petitioner filed a complaint against Baniszewski, Johnson and Honer in April 1989 with respondent Denver Police Department's Internal Investigation and Inspection Bureau ("IIIB"). *Id.* The district court found that "[u]pon filing of the IIIB complaint, an investigation of [the petitioner's] allegations was undertaken. . . . The investigating officer . . . found [the petitioner's] complaints to be generally rambling and unclear. There were many allegations which were vague and uncertain, and interviews with individuals identified by [the petitioner] generally did not verify her allegations. Accordingly, after a thorough investigation, the complaint was determined to be unfounded." *Id.* at 393.

Contrary to the petitioner's assertions, it has not been established that "Respondents Baniszewski and Johnson used the authority with which they [sic] clothed by the Denver Police Department [in their off-duty positions] to retaliate against [the petitioner]." Pet. 4.[2] Instead, the district court dismissed the claims against Baniszewski and Johnson, and the Tenth Circuit Court of Appeals ("Tenth Circuit") reversed that decision on the ground that the district court had treated the respondents' motion as a summary judgment motion rather than a motion to dismiss with respect to Baniszewski and Johnson but failed to give the petitioner notice of the district court's conversion of the motion to dismiss to a motion for summary judgment. Pet. 11a. As a result, the Tenth Circuit remanded the case with respect to respondents Baniszewski and Johnson, and the case against them remains pending before the district court with a scheduled trial date of December 1, 1997. Pet. 16a & 30a.

2. References to the Petition for a Writ of Certiorari will be in the form of "Pet. __."

Petitioner filed a charge with the U.S. Equal Employment Opportunity Commission ("EEOC") on May 3, 1989. In June 1989, she sent a letter to the Denver City Attorney asserting claims of sexual harassment and retaliation against the City and individual police officers. In July 1989, petitioner filed a second charge with the EEOC. Pet. 4a-5a. Apparently this is the speech the petitioner claims concerns matters of public concern. Pet. 20a-21a.

After the filing of the IIIB complaint in April 1989, Carpenter transferred the petitioner to a different shift. Carpenter offered various legitimate, non-retaliatory reasons for this transfer, including that it seemed likely that the officers on her detail would takes side with either the petitioner or Baniszewski, and Carpenter felt such a rift "obviously would seriously undermine morale and cooperation essential in the operation of law enforcement officers." Pet. 10th Cir. Apndx. at 394.

Petitioner's claim of retaliation arose from disciplinary actions which followed after she filed her IIIB complaint. Petitioner had previously been suspended for thirty days in May 1988 (before her sexual harassment complaint to IIIB) as a result of chronic tardiness. Twenty days of that suspension had been held in abeyance on the condition that the petitioner not suffer additional discipline for tardiness for a period of one year. *Id.* at 395-96. On April 28, 1989, the petitioner was written up for being late for roll call, in violation of respondent Leo's "clear and substantially inflexible rules regarding tardiness." *Id.* As a result, the 20-day suspension that had been held in abeyance was recommended by respondent Chief of Police Zavaras and approved by respondent Manager of Safety Martinez. *Id.* at 396.

Petitioner was again written up as tardy for roll call by the duty sergeant, Sergeant Costigan on May 16, 1989. *Id.* at 397. Although there was disagreement among command officers as

to how the procedures which provided for penalties for repeated discipline should be interpreted, Chief Zavaras interpreted the procedures in the more strict fashion, thereby recommending that the petitioner be suspended for six months without pay. *Id.* at 397, 399-400. The district court found that the interpretation adopted by Chief Zavaras "appears reasonable based upon legitimate personnel policies and no evidence is presented that it was discriminatory." *Id.* at 400. Chief Zavaras also recommended an additional twenty-day suspension for the petitioner's April 28, 1989 tardy. On August 29, 1989, Manager of Safety Martinez concurred with Chief Zavaras's recommendations and imposed the penalties upon petitioner. *Id.*

The district court noted that "Chief Zavaras testified at length regarding the punctuality problem he inherited when he took over as Chief [of Police] in 1987. He had instituted a procedure of discipline for tardiness which provided heavy penalties against 'chronic' tardiness offenders, with some of the penalty suspended on condition that the officer have no further tardiness write-ups for one year. . . . This was clearly a reasonable non-discriminatory reason for the implementation of his disciplinary rules, and was arguably not contrary to police department policy." *Id.*

B. Proceedings Below

Pursuant to Supreme Court Rules 15(3) and 24(2), the respondents are dissatisfied with the petitioner's summary of the proceedings below as the petitioner omits portions of the district court's grant of the respondents' summary judgment motion and the Tenth Circuit's affirming of that motion which are critical to a review of issues before this Court. Pet. 5-7. With respect to the Tenth Circuit's application of this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), the respondents assert that it is necessary for this Court to review the Tenth Circuit's complete analysis of that issue found at Pet. 17a-22a.

In addition, with respect to the petitioner's recusal argument, the petitioner misstates the district judge's statements regarding his prior knowledge of one of the respondents and the respondents' witnesses. Pet. 6. The status conference held by the district judge on November 12, 1993, was not transcribed. Pet. 10th Cir. Apndx. 441. Nor was the district court's November 23, 1993 hearing on petitioner's motion for recusal. *Id.* at 442. Accordingly, the only reference of the district judge's remarks (regarding his knowledge of one of the respondents and three of their witnesses) is the district judge's November 24, 1993 order denying the petitioner's motion for disqualification, *i.e.*, recusal, Pet. 31a-36a, and the parties' attorneys' recollections of the status conference. Pet. 10th Cir. Apndx. 242-53.

Petitioner claims that the district judge stated that he was a "pretty close friend" of the current Chief of Police David Michaud who was one of the respondents' witnesses. Pet. 6. Respondents' counsel, however, indicated that he did not recall the district judge using the term "pretty close friend." Pet. 10th Cir. Apndx. 247. Nor did the district judge describe his relationship with Chief Michaud in that way. Pet. 32a-34a. Instead, the district judge indicated that he represented Chief Michaud in a § 1983 case twenty years earlier when Chief Michaud was a member of the Sheriff's Department of Weld County, Colorado. Pet. 32a-33a. The district judge never represented Chief Michaud as his personal attorney. Following that case, the district judge had "had brief conversations with Chief Michaud on probably four or five occasions prior to December of 1992, at which time Chief Michaud in his official capacity as Chief of the Denver Police Department headed the investigation of the killing of the [district judge's] son, Douglas Sparr. During that investigation, the [district judge] recall[ed] two or three conversations with Chief Michaud relative to the investigation." Pet. 33a.

Petitioner further claims that Sergeant Armedia Gordon, another of respondents' witnesses, was one of the investigating officers in the case involving the district judge's son's homicide. Pet. 6. Petitioner claims that the district judge stated that he knew Manager Martinez, one of the respondents, and Tina Rowe, one of respondents' witnesses. Pet. 6. The district judge indicated that Sergeant Gordon interrogated him "for approximately 30 minutes on the first evening of the [homicide] investigation. There was no further contact with Sergeant Gordon during the ongoing investigation other than being made aware of her participation therein." Pet. 33a.

The district judge indicated that he was acquainted with Manager Martinez when the district judge was a state court judge and Mr. Martinez was assigned to the Office of the Public Defender in the state court district. Pet. 33a. The district judge further indicated that after Mr. Martinez was appointed Manager of Safety for the Denver Police Department, the district judge "had several passing conversations with him in the course of hearing cases involving the City and County of Denver and in the halls of the City and County Building." Pet. 33a. With respect to Ms. Rowe, the district judge indicated that he did "not recall ever meeting" her. Pet. 33a.

The district court's complete decision regarding petitioner's motion for recusal is found at Pet. 31a-36a, and the Tenth Circuit's review of the district court's recusal decision is found at Pet. 8a-9a. Finally, it is important to note that ultimately the district court, after a trial, rejected the petitioner's claims of sexual harassment and retaliation under Title VII. Pet. 10th Cir. Apdnx. 18 & 21. The Tenth Circuit affirmed on the Title VII claim. Pet. 29a.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO SPLIT IN THE CIRCUITS OVER WHETHER THIS COURT'S DECISION IN *CONNICK V. MYERS* RENDERS A PUBLIC EMPLOYEE'S ALLEGATIONS OF SEXUAL HARASSMENT MATTERS OF PUBLIC CONCERN.

Petitioner alleges that the United States Courts of Appeals for the various circuits (the "Circuits") are split over whether this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), renders a public employee's allegations of sexual harassment matters of public concern. There is no such split in the Circuits, and therefore Supreme Court Rule 10(a), involving conflicts between Circuits, is not implicated and the petition should be denied.

In *Connick*, 461 U.S. at 147-48, the Court set forth a test to determine when speech by a public employee is protected by the First Amendment:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. . . . Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.

Petitioner argues that some Circuits consider the speaker's motive to be dispositive, while others consider motive as only one factor. Pet. 12-13. Petitioner further argues that the presence or absence of media attention is a factor important in some Circuits, and ignored by others. Pet. 13. Finally, it also appears that the petitioner argues that sexual harassment allegations should always be found to constitute a matter of public concern. Pet. 7. The petitioner's arguments must fail.

The petitioner mischaracterizes the state of Circuit precedent. The Circuits have relied and continue to rely upon *Connick* as establishing the controlling rule. Indeed, this Court has cited *Connick* with approval as recently as 1996 in *Board of County Comm'rs, Wabunsee County, Kan. v. Umbehr*, __ U.S. __, 116 S. Ct. 2342, 2347 (1996). Moreover, the cases cited by petitioner properly applied *Connick* in determining when speech involves a matter of public concern. The primary requirement from *Connick* is that a court should not look at one factor, such as motive, to the exclusion of the others. This requirement does not mean that a court may not give more weight to some factors than to others. In the cases cited by the petitioner, the respective courts applied the *Connick* test to the facts, and found that some factors weighed more heavily than others in each case. This is an appropriate application of *Connick*.

The gravamen of the petitioner's argument is that all allegations of sexual harassment are consistently matters of public concern. Respondents submit that the fact that the Circuits reach different conclusions regarding allegations of sexual harassment is consistent with this Court's instruction that content, form and context be considered. Indeed, the *Connick* Court reiterated a statement first made in *Pickering v. Board of Education*, 391 U.S. 563, 569 (1968), which undermines the petitioner's purported Circuit split argument: " 'Because of the enormous variety of fact situations in which critical statements

by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.' " *Connick*, 461 U.S. at 154. Petitioner appears to seek the Court's grant of her petition so that the Court can then do just that, *i.e.*, lay down a general standard against which all sexual harassment allegations may be judged. This is not "appropriate or feasible." *See Azzaro v. County of Allegheny*, 110 F.3d 968, 980 (3d Cir. 1997) (en banc) ("we do not suggest that all public employee complaints about sexual harassment are matters of public concern").[3]

In light of the fact-driven nature of the analysis of whether a public employee's speech is a matter of public concern, the petitioner's attempt to set up a conflict among the Circuits that requires this Court's resolution is artificial. There is not a conflict simply because some facts have compelled some Circuits to find allegations of sexual harassment to be a matter of personal concern, while other facts have compelled some of the same Circuits as well as other Circuits to find allegations of sexual harassment to be a matter of public concern. *Compare David v. City and County of Denver*, 101 F.3d 1344 (10th Cir. 1996), *Rice v. Ohio Dep't of Transp.*, 887 F.2d 716, (6th Cir. 1989),[4]

3. To the extent that the petitioner relies upon this Court's statement in *Connick* that an individual's "right to protest racial discrimination" is "a matter inherently of public concern," to support her argument that sexual harassment allegations should always be found to be matters of public concern, such reliance is misplaced. 461 U.S. at 148 n.8 (citing *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)). This country's history with respect to slavery and other racially-related atrocities, which were only partly addressed by the passage of the Thirteenth Amendment, renders *sui generis* speech about race discrimination.

4. Certiorari was granted by this Court in *Rice* and the decision was vacated and remanded on other grounds. 497 U.S. 1001 (1990). After further proceedings, the Sixth Circuit rendered a decision in *Rice*, 14 F.3d 1133 (6th Cir.), *cert. denied*, 512 U.S. 1207 (1994).

and *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990)[5] (all of which found some speech by public employees regarding sexual harassment or sex discrimination to involve personal matters), *with Azzaro v. County of Allegheny*, 110 F.3d 968 (3d Cir. 1997) (en banc) and *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988) (both of which found speech by public employees regarding sexual harassment to involve matters of public concern).

Petitioner claims that the Third Circuit's decision in *Azzaro*, 110 F.3d at 968, conflicts with the Tenth Circuit's decision in this case. The *Azzaro* court stated that finding the speaker's motive as determinative is inconsistent with *Connick*. 110 F.2d at 978. Petitioner erroneously argues that by contrast, the Tenth Circuit relied solely upon petitioner's motive in this case to the exclusion of other factors. The Tenth Circuit did not consider only the employee's motive, however; indeed, the Tenth Circuit stated that it must consider the " 'content, form and context of a given statement, as revealed by the whole record,' " as well as the motive. Pet. 19a (*citing Connick*, 461 U.S. at 147-48). Accordingly, the purported conflict between the Third and Tenth Circuits is illusory.

Similarly, the petitioner's assertion of a conflict between the Tenth Circuit's decision in this case and the Seventh Circuit's decision in *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990), *cert. denied*, 501 U.S. 1204 (1991), is inaccurate. In *Auriemma*, the court stated the speech by plaintiffs, eighteen white police officers who claimed they were demoted because of their race by a black superintendent of the Chicago police department, was not a " 'run-of-the-mine single-plaintiff lawsuit,' " distinguishing an earlier Seventh Circuit case. 910 F.2d at 1460

5. In *Gray*, the court found two of the plaintiff's statements to relate to personal matters, but the third to be a matter of public conern. 885 F.2d at 411.

(*quoting Yatvin v. Madison Metropolitan Sch. Dist.*, 840 F.2d 412, 420 (7th Cir. 1988)). The *Auriemma* court stated that the case involved "pervasive or systemic misconduct by public officials." 910 F.2d at 1460. By contrast, the Tenth Circuit analysis at issue here did involve a "run-of-the-mine single plaintiff lawsuit," and is by its dramatically different facts is not similar to *Auriemma.*

Petitioner appears to assert that the Sixth Circuit's decision in *Matulin,* 862 F.2d at 609, conflicts with the Tenth Circuit's decision in this case. In *Matulin*, the Sixth Circuit determined that a public employee's allegations of sex and handicap discrimination made to a reporter involved a matter of public concern. However, *Matulin* is distinguishable from this case in that the employee there indicated that she was giving the interview not for personal reasons, but because she wanted to inform the public about discrimination in that office generally, and the reporter initiated the story by approaching the employee (rather than the employee having approached the reporter). *Matulin*, 862 F.2d at 611. Those facts convinced the *Matulin* court that the employee was speaking as a citizen on matters of public concern, in contrast with this case, where the Tenth Circuit concluded that petitioner was speaking as an employee on matters of private concern. The petitioner's reference to news media in her case should not be considered as the speech analyzed by the Tenth Circuit was comprised of two EEOC charges and a letter to the Denver City Attorney, not statements to the media. Like in this case, in *Rice*, the Sixth Circuit determined that a public employee spoke purely for his own interest and, unlike the employee in *Matulin*, did not speak about a public controversy. The court therefore determined the speech in *Rice* was not a matter of public concern. *Rice,* 887 F.2d at 720-21.[6]

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6. It appears that the petitioner argues that certiorari should be granted because there purportedly are intra-circuit conflicts in at least the Sixth and (Cont'd)

II.

THE TENTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED *CONNICK V. MYERS* TO DETERMINE THAT A PUBLIC EMPLOYEE'S SPEECH DID NOT INVOLVE A MATTER OF PUBLIC CONCERN.

Petitioner asserts that the Tenth Circuit Court of Appeals improperly applied *Connick* to determine that the public employee's speech at issue did not involve a matter of public concern. That assertion is without merit — the Tenth Circuit accurately and thoroughly applied the *Connick* standard to the facts before it. Petitioner claims that the Tenth Circuit focused only on petitioner's motive in making her complaints, and this focus indicated a failure to follow the *Connick* requirement that one consider the whole record and the context, form and content of the statement. However, not only did the Tenth Circuit cite that language from *Connick*, it explicitly stated that the "fundamental inquiry" is whether the plaintiff speaks as an employee or as a citizen. *David*, 101 F.3d at 1355 (*citing Connick*, 461 U.S. at 147). The Tenth Circuit further stated "the fact that the plaintiff's complaints involved personal grievances about internal employment conditions was not the end of the inquiry." 101 F.3d at 1356 (*citing Connick*, 461 U.S. at 149, and *Woodward v. Worland*, 977 F.2d 1392, 1404 (10th Cir.1992), *cert. denied*, 509 U.S. 923 (1993)). Upon review of the petitioner's EEOC complaints and letter to the Denver City

(Cont'd)

Seventh Circuits. Pet. 12. As described herein, the different results reached with the Sixth and Seventh Circuits, respectively, were based on different facts — not on inconsistent application of the law. Moreover, even if there were a intra-circuit conflict, a conflict within another Circuit does not provide a compelling reason to grant certiorari in this particular case involving the Tenth Circuit. If other Circuits misapply the law, then this Court should grant certiorari when and if a case from one of those Circuits reaches this Court, but not in this case, where the law was properly applied.

Attorney, the Tenth Circuit concluded the petitioner's speech was personal to her and that there were no allegations of interference with the Department's performance of its governmental responsibilities. *Id.* at 1356. In short, the Tenth Circuit did not consider motive to be dispositive, but rather it reviewed all aspects of petitioner's speech as required by *Connick*. Consequently, certiorari should not be granted based on the argument that the Tenth Circuit improperly applied *Connick*.

Notwithstanding the Tenth Circuit's proper decision, Supreme Court Rule 10 states that a petition "is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Accordingly, even if the Tenth Circuit had misapplied the law, it accurately set forth the *Connick* standard and therefore certiorari would not be justified on that basis. In sum, there is no justification for granting petitioner's request for certiorari on the First Amendment public concern issue because the Tenth Circuit properly applied the appropriate law and there is no split among the Circuits. Petitioner's argument essentially is a disagreement with the lower courts' finding of facts and application of law to those facts — not a legitimate disagreements of law that requires this Court's intervention.[7]

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7. Moreover, this would not be a good case factually in which to grant certiorari in that the petitioner's complaints involved off-duty conduct, not necessarily related to her status as a public employee. Moreover, the sexual harassment allegations were rejected by IIIB as "generally rambling and unclear," "vague and uncertain," and "unfounded." The district court and Tenth Circuit also concluded that the petitioner had not established her claims of sexual harassment and retaliation.

III.

THE TENTH CIRCUIT COURT OF APPEALS APPROPRIATELY REVIEWED FOR ABUSE OF DISCRETION THE DISTRICT COURT JUDGE'S DECISION NOT TO RECUSE HIMSELF FROM THE CASE UNDER 28 U.S.C. § 455(a).

Petitioner argues that the Tenth Circuit did not apply the standard set forth in *Hinman v. Rogers*, 831 F.2d 937 (10th Cir. 1987), to determine if the district judge should have recused himself. Petitioner concedes that the Tenth Circuit "referred" to the correct standard in its decision, Pet. 15, but suggests that the district court must not have applied the *Hinman* objective standard because the district court denied the recusal motion. This assertion by the petitioner is nothing more than an attempt to transform a matter of judicial discretion into a question of law.

The Tenth Circuit applied the *Hinman* objective standard, *i.e.*, the reasonable person standard, examined each point advanced by the petitioner supporting recusal, and found them lacking. *David,* 101 F.3d at 1351. The Tenth Circuit's review of the district court's decision concluded that the trial judge did not abuse its discretion in denying officer David's motion for disqualifications pursuant to 28 U.S.C. § 455(a). *Id.* These findings were supported by the evidence and are not clearly erroneous, so there is no justification for a grant of certiorari. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 174 (1938) (concurrent findings of both courts below will not be disturbed unless plainly without support); *Commissioner v. Duberstein,* 363 U.S. 278, 291 (1960) (where the trial has been by a judge without a jury, the judge's findings must stand unless clearly erroneous).

Even if the decision of the Tenth Circuit concerning recusal was clearly erroneous, certiorari is simply not justified because the Tenth Circuit applied the proper standard. *See* Supreme Court Rule 10 (certiorari will rarely be granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law); *General Talking Pictures Corp.*, 304 U.S. at 178 (certiorari will not be granted merely to review the evidence or inferences drawn therefrom); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (certiorari was improvidently granted and will be withdrawn where the case involves merely a review of findings of fact which would be of no importance save to the litigants themselves).

Petitioner argues that a reasonable person would believe that the judge would feel indebted to the police chief and to the Denver Police Department for investigating his son's murder, and the judge would repay this "debt" by giving the police department and the police chief favorable treatment. As the Tenth Circuit noted, there was absolutely no evidence of favoritism by the judge in the trying of the case, and it is not at all unusual for a judge with criminal jurisdiction to have some contacts with the police department and its officers over the years. *David*, 101 F.3d at 1351.

Petitioner also argues that a newspaper article urging that the trial judge recuse himself compels a conclusion that the judge's impartiality can reasonably be questioned. Pet. 16. In *United States v. Cooley*, 1 F.3d 985, 993-94 (1993), the Tenth Circuit makes clear that a reporter's personal opinion appearing in the media will not ordinarily satisfy the requirements for disqualification under § 455(a).

As a second, related reason for recusal, petitioner argues that the judge's representation of the police chief once more than twenty years ago, when the chief was a deputy sheriff,

would result in a reasonable person doubting the judge's impartiality. As the Tenth Circuit noted, a judge's prior representation of a party is not automatic grounds for recusal. *David,* 101 F.3d at 1351. As the Tenth Circuit noted in *United States v. Cooley* 1 F.3d 985, 993 (1993), "[t]he inquiry is limited to outward manifestations and reasonable inferences drawn therefrom." There were no outward manifestations of bias, so there is no reason to question the judge's decision not to recuse.

The *Hinman* test "must not be so broadly construed that it becomes, in effect, presumptive so recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." *Franks v. Nimmo*, 796 F.2d 1230 (10th Cir. 1988). If the Court were to accept the petitioner's argument in this case, it might result in required recusal of any judge who had ever had a crime against him or her investigated by the police. Also, as the Tenth Circuit noted, in this era of crowded dockets "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *David*, 101 F.3d at 1351.

CONCLUSION

Petitioner's attempt to elevate disagreement with the Tenth Circuit decision at issue clearly fails to meet this Court's compelling reasons standard for granting certiorari. There simply is no split in the Circuits involving *Connick v. Myers*. The record of the proceedings clearly established that the Tenth Circuit's conclusion that the trial judge did not abuse his discretion pursuant to 28 U.S.C. § 455(a) was appropriate based on the law and the facts.

Accordingly, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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